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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDMUND FRENCH,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Was there a denial of due process and equal protection under the Fourteenth Amendment at Petitioner's trial?

2. Has Petitioner raised a federal question?

On the basis of the following brief, the answer to both questions should be NO.

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STATEMENT OF THE CASE

Prior to trial, and pursuant to New York Criminal Procedure Law Section 710.30, subdivision 1(a) (Full Text reproduced Petitioner's Appendix B—page 2a of petition — hereafter C.P.L.) notice was given that petitioner's statement to police, "I just couldn't take it any more, I had an argument with him and I shot him," would be used at trial. (Petitioner's Appendix C, page 3a of petition). Contemporaneous with the above statement, petitioner stated, "I found the gun" (Appendix C at 3a). However, this part of the statement was not specifically noticed.

Petitioner did not move for a hearing to test the voluntariness of the portion of the statement noticed prior to trial, nor was there objection to the unnoticed part as to its voluntariness, but only that it had not been noticed pursuant to the mandate of the statute.

The trial Court gave an immediate curative instruction to the jury advising them that the unnoticed portion of the statement was not evidence in the case (Petitioner's Appendix C, page 3a).

He had told police he had shot his nephew (Respondent's Appendix 1) and that he spoke to the police voluntarily (Respondent's Appendix 2). Petitioner was asked concerning the unnoticed, "I found the gun" and his initial reply was that it was not himself, but the victim, to whom petitioner referred to as finding the gun (Respondent's Appendix 3).

The petitioner rested his case and the People called Police Officer O'Halloran in rebuttal who testified that petitioner told him he had found the gun (Petitioner's Appendix D, page 4a) and that there was no doubt that the "he" referred to was petitioner himself (Respondent's Appendix 4).

The trial Court, in its main charge to the jury, instructed that:

" . . . any answers that were stricken from the record, you must treat as not part of the evidence either. You must treat it as if those answers had never been given." (Respondent's Appendix 5 and 6)

Petitioner's appeal of his conviction to the Appellate Division, Second Department of the New York State Supreme Court raised several issues. This petition seeks review of only the use of the non-noticed part of the statement. The thrust of the argument (Briefed Point attached as Respondent's Appendix 7-16) at the Appellated Division stressed the use of the statement on the People's direct case and only secondarily concerned the use of the statement on cross-examination, rebuttal and in summation. The present argument stresses the latter argument.

In affirming the conviction, the Court below cryptically cites *People v. Crimmins,* 36 NY 2d 230.*

The petitioner after his conviction had been affirmed was denied leave to appeal to the Court of Appeals.

---

* *People v. Crimmins* is the oft cited New York authority on what is and what is not harmless error in both constitutional and nonconstitutional senses. *Crimmins* (id. at 237) adopts the rule of *Chapman v. California,* 386 U.S. 18 for harmless constitutional error. The rule for harmless nonconstitutional error is not so exacting, but common to both is that the doctrine of harmless error will not be considered at all ". . . unless the proof of defendant's guilt, without reference to the error, is overwhelming . . ." (*Crimmins,* id. at 237)

REASONS FOR DENYING THE WRIT

THE RESPONDENT'S FAILURE TO NOTICE A PART OF PETITIONER'S STATEMENT USED AT TRIAL PRESENTS NO FEDERAL QUESTION WHERE THE VOLUNTARINESS OF THE STATEMENT WAS NEVER QUESTIONED.

The error in not noticing a part of petitioner's statement at trial must now be conceded to have been error because that was the position of the Respondent in the court below in arguing that the error was harmless. In light of more detailed research, Respondent would not have taken such a position for absent a question of voluntariness there is no need for notice pursuant to New York Criminal Procedure Law Section 710.30, *People v. Greer,* 42 NY 2d 170, 178.

Petitioner correctly points out that there are factual similarities between *Greer* (id.) and the present case in that both involved a statement, part noticed and part unnoticed. However, the similarity ends when the action of the defendant in *Greer* (id.) in objecting to the admission of the unnoticed statement on grounds of it being involuntary, finds no counterpart in the case at bar.

The New York State Court of Appeals in *People v. Greer,* 42 NY 2d 170, 178 points out that:

> "(T)he obvious purpose of the statute (NY CPL Section 710.30) is to afford a defendant adequate time in preparing his case in respect to the voluntariness of a confession or admission (*People v. Ross,* 21 NY 2d 258, 262)."

This requirement is mandated by *Jackson v. Denno,* 378 U.S. 368 to afford a pre-trial determination of the voluntariness of a statement.

In the case at bar, a part of the contemporaneous statement, definitely exculpatory, "I just couldn't take it

any more, I had an argument with him and I shot him," was noticed pursuant to C.P.L. 710.30 but, as petitioner concedes, no pre-trial motion was made (Petition, p. 4). At the time of introduction of the unnoticed statement, the only objection was to the fact that the requirement of C.P.L. 710.30 was not followed. There is no indication in either the trial record, or in argument before the Appellate Division, that the use of the statement was challenged on grounds of it being involuntary. In fact, petitioner admitted at trial that he had voluntarily spoke to the police (Respondent's Appendix, p. 2). In the absence of any objection on the grounds of involuntariness, there is no sound reason why the point should be considered on appeal. *People v. Travison,* 59 AD 2d 404, 407 aff'd 46 NY 2d 758.

The above analysis clearly points to the fact that, absent a question of involuntariness, a failure to comply with the notice requirement of C.P.L. Section 710.30 is purely procedural and does not involve any constitutional deprivation.

In affirming petitioner's conviction, the Appellate Division cited *People v. Crimmins,* 36 NY 2d 230. Although *Crimmins* deals with both constitutional and non-constitutional harmless error, it is clear that in the context of the present record, the Appellate Division found that there was harmless error in a non-constitutional sense. In any event, the Appellate Division, in citing *People v. Crimmins* (id. at 241), would not have considered the harmless error doctrine in either constitutional or non-constitutional sense unless there was overwhelming proof of petitioner's guilt without reference to the claimed error.

Here we are dealing with the use of testimony which, but for the failure to give notice, would have been competent material and relevant. The trial court gave immediate instruction followed by additional instruction in the main

charge that the answer was stricken and could not be considered as evidence.

The petitioner's argument to the Appellate Division that he was deprived of a fair trial was predicated solely on the failure to abide by the notice requirement of a State Statute. Except for the citation of *Gideon v. Wainwright,* 372 U.S. 335 which dealt with a totally different constitutional issue, there was no indication that a challenge was being made to the constitutionality of failure to give notice, or how that related to a right to assistance of counsel.

The effect of the unnoticed statement on the direct case was removed by the trial Court's curative instruction. The use of the unnoticed statement to impeach petitioner was proper in light of *Harris v. New York,* 401 U.S. 222.

Petitioner's reliance on *People v. Barrie,* 74 AD 2d 576 is misplaced as a sttement of New York Law for there is no Court of Appeals holding that notice is required when a statement is used to impeach. The language to this effect in *Barrie* (id.) is clearly dicta. How the prosecution knows they intend to use a statement only during the defense case before they hear the defense case cannot be answered. It is therefore impossible in such a situation to give notice pursuant to C.P.L. Section 710.30.

Nothing in this record shows that a constitutional issue was ever tendered to the State Courts. *Ungar v. Sarafite,* 376 U.S. 578, 582, 84 S.Ct. 841. 846. If a constitutional issue was never tendered then, under U.S.C. Title 28 Section 1267 subd. 3, there is no power in this Court to consider the question, *Street v. New York,* 394 U.S. 576, 581-582, 89 S.Ct. 1354, 1360, and it should be assumed the omission was due to a want of proper presentation. Petitioner has failed to affirmatively show the contrary.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Respectfully submitted,

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APPENDIX "A"
TRANSCRIPT OF TESTIMONY FRENCH-CROSS

Q. Do you recall his testimony that he walked up to you and had some conversation with you?

A. Yes.

Q. Is it your testimony now that you walked up to police officer?

A. Yes.

Q. Was it Officer O'Halloran—

A. I am not sure.

Q. Whoever that officer was, you told him that you shot your nephew or this man?

A. Yes.

Q. What else did you tell this officer?

A. I don't know that I told him anything. I don't know, I don't remember.

Q. What did he say to you?

A. I don't remember.

Q. What did he do to you, if anything?

A. I remember—the next thing I remember, he just asked me to raise my hands. Somebody said to me, "Where is the gun?" I said, "In my house." I raised my hands, he searched me down, and one of the officers put me in handcuffs and took me into the car.

Q. The officer, Mr. French, that searched you, did he have your hands up against the wall or something?

A. I believe so.

APPENDIX "B"
TRANSCRIPT OF TESTIMONY FRENCH-CROSS

Q. You think so?

A. I believe so, sir. I was so emotionally—

Q. Were you sober at that time?

A. Yes, sir.

Q. Did the policeman in any way threaten you, Mr. French?

A. No, sir.

Q. Did they in any way coerce you to talk to them?

A. I don't believe so, sir, no.

Q. They didn't put a gun to your head or say, "Talk to me."

A. No, they didn't.

Q. Did you voluntarily speak to the police officer when they came to the scene, sir?

A. Yes.

Q. Is it a fair statement, Mr. French—withdrawn.

When you got in the police car, how many police officers were in there, if you recall?

A. I think two.

Q. You had a conversation with those police officers?

A. I believe so.

Q. Mr. French, did you tell the police officers that your nephew and you have been having a problem for about six months?

APPENDIX "C"
TRANSCRIPT OF TESTIMONY FRENCH-CROSS

. . . WHY YOU SHOT Bobby Schnell; could he have been correct if that's what yo did tell him?

A. If he said that, I wouldn't say the man would come up here and lie—

Q. Would you please answer my question?

A. I am trying to the best of my ability. What I told the man, what he would say, I don't think he would come in here and lie, but I don't remember saying words to that effect.

Q. But you might very well have said that, is that right?

A. It's a possibility. I don't think so, but it—

Q. Mr. French, lastly, sir, that same night in the police car, did you tell Officer O'Halloran that you shot Bobby Schnell because you couldn't take the harrassment any longer, and that you shot him with a gun that you found?

A. I didn't find that gun. Bobby had found that gun.

Q. Sir, my question is did you tell the police—

MR. PETERSON: That's being responsive.

MR. O'SHEA: That's not being responsive.

THE COURT: Mr. O'Shea, first of all, stand back. Second of all, the answer is not responsive. Read the question back.

(Question read back).

A. No, sir.

APPENDIX "D"
TRANSCRIPT OF TESTIMONY
O'HALLORAN-CROSS

Q. Cursing at his wife or words to that effect?
A. Are you asking me?
Q. Cursing at his wife or words to that effect?
A. Yes.
Q. He couldn't take it any longer or words to that effect?
A. Yes.
Q. He shot Schnell with the gun he found, is that correct? He?
A. That the defendant found.
Q. Did you write the word "he," sir?
A. Yes, sir.
MR. CRECCA: Thank you, Officer.

REDIRECT EXAMINATION BY MR. O'SHEA:
Q. Officer, when he told you that he shot him with a gun that he found, was there any doubt in your mind who the "he" was?
MR. CRECCA: Objection.
THE COURT: Overruled.
A. Not at all.
Q. Who was the "he" that he was talking about?
A. Himself.
Q. Officer, did you at any time ask Mr. French to sign this statement? Withdrawn.

APPENDIX "E"
CHARGE

Occasionally during the trial a lawyer has objected to a question put to a witness by his opponent and I have sustained the objection and the witness was not permitted to answer the question. Obviously an unanswered question is not evidence and you may not speculate as to what answer the witness may have given had it been legally permissible for the witness to answer that question. Also, any answers that were stricken from the record, you must treat as not part of the evidence either. You must treat it as if those answers had never been given.

Now, I tell you that evidence of the good character of the defendant, if you find it credible may alone raise a reasonable doubt as to his guilt. Now, I'm sure that you could see that one of your most important duties is to decide on the credibility that is the believability of what the various witnesses have told us. This is not necessarily an easy task and there is no magic formula that I can give you to make it any easier for you, but there are some factors that I would like to suggest that you take into consideratin in deciding what testimony you are going to believe.

For example, consider the probability or improbability of the testimony of each witness. Consider also the opportunity eac witness had to see or hear the things that he has described for you wat it in a good position? Was it the sort of thing that is likely to make . . .

APPENDIX "F"
POINT I OF BRIEF

The right of the accused to a fair trial is the very cornerstone upon which rests our entire system of criminal justice.

Basic to the concept of a fair trial is the right of the accused to be represented by counsel. Moreover, the right to counsel necessarily includes more than simply having an attorney physically pre;sent during the course of the trial. Mere formalistic adherence to the basic tenet enunciated in Gideon v. Wainwright (372 U.S. 335) that the accused in a criminal case is entitled to the assistance of counsel, has not been condoned. In fact that principle has been greatly expanded by subsequent cases as well as legislative decrees.

The Criminal Procedure Law, §710.30 provides as follows:

> 1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of §710.20 . . . . they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.
>
> 2. Such notice must be served within fifteen days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of §710.40, to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice thereafter and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion.
>
> 3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him

upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of §710-70.

The Disclosure Form and Notice Pursuant to CPL §710.30 supplied to counsel for the defendant, a copy of whic is annexed hereto and made a part hereof, indicated that the people intended to offer as evidence during the trial na oral statement made by the defendant to Police Officer John O'Halloran on August 26, 1979. The substance of the statement is as follows:

"Defendant stated Schnell was his nephew. They had been arguing on and off for 6 months. Schnell had been harrassing him and his wife. He couldn't take the harrassment any longer so he shot Schnell."

During the course of the People's direct examination of Police Officer O'Halloran the following testimony was elicited:

Q. What did you do, if anything, at that time?

A. I approached Mr. French and I asked him what had happened.

Q. Where was Mr. French at that time?

A. He was standing on the corner of Midland and Moreland.

Q. Was anybody with him?

A. Not at that time, no.

Q. You approached him?

A. Yes, I did.

Q. Tell the jury just what happened when you approached him.

A. I approached him and asked him what had happened, and he stated to me he just had an altercation with the complainant, and it's been an on-going dispute, more

or less, for the last six months, and the complainant had been in his house that night, had an argument with his wife and destroyed some property. He says I just couldn't take it any more, I had an argument with him and I shot him.

Q. Did you further question—you further have any conversation with him?

A. Yes, I did.

Q. What did that involve?

A. I had asked him where the gun was.

Q. Did he respnod?

A. No.

Q. What happened next?

A. A woman whom I now know, I believe it's his wife, Helen, directed Officer Zarrilli to his address, 216 Moreland Avenue.

Q. You mean the defendant's address?

A. Mr. French's address and they had gone upstairs and in a matter of seconds they came out and Officer Zarilli handed me a gun.

Q. What did you do with that gun?

A. I secured the gun in my pants pocket.

Q. What did you do with Mr. French, if anything?

A. I had asked Mr. French where he had got the gun.

Q. What did he tell you?

A. He said he found it.

MR. PETERSON: Objection, Judge.

THE COURT: You asked whom?

THE WITNESS: Defendant

THE COURT: Overruled.

MR. PETERSON: May we have a side bar.

(Whereupon a discussion was held off the record at the side bar outside the presence of the jury).

MR. CRECCA: Judge, if the Court pleases, the defense will move to strike the testimony of this gentleman, especially the latter portion of same.

THE COURT: The entire testimony?

MR. CRECCA: The latter portion.

THE COURT: The question with regard to or the answers allegedly made by the defendant to the effect that he found the gun, that will be stricken, the jury is instructed to treat that answer as if it had never been given. It is not part of the evidence in this case (pp. 197-199).*

The law regarding the requirement that the people supply to the defense pretrial notice of their intention to use a defendant's statements as evidence against him has been clearly stated on numerous occasions and is founded upon considerations of fairness and the requirement that the defendant be given a fair trial.

Although it is likely that a defendant will be aware of the People's intention to use a pretrial statement made by him as evidence against him at trial, there exists a reasonable probability of his unawareness of such statement in some instances and an even greater probability that his own counsel will be unaware of the intended use of such a statement. (of Denzer, Practice Commentary, McKinney's Consolidated Laws of New York, Book 11A, CPL 710.30, p. 238). Thus, it is apparent that the rationale for §710.30 is to inform defense counsel, in advance of the existance of any statements made by his client in order to insure the existence of a fair trial.

In People v. Quarles, 44 Misc. 2d 955, 960, the Court after a most scrupulous examination of past cases, came to the conclusion that the defeendant is entitled to have his attorney examine any statements made by his client to a public servant. The failure to permit this would serve to deprive the defendant of his right to a fair trial.

In People v Chirico, 61 Misc. 2d 157, 162 the Court reasoned that counsel for the defendant must come to a decision, during the preparation of his case, as to whether or not to put the defendant on the stand. If a copy of any statement made by the defendant is not made available to counsel for the defendant, said counsel is not in a position

to make a reasoned and intelligent decision. Fairness and justice, and defendant's fundamental right to a fair trial demand that a pretrial request for a copy of any sttement made by a defendant be granted.

In People v. Utley, 77 Misc. 2d 86, 94, the Court indicated the importance of providing defense counsel with pretrial notice of any oral statements made by the defendant. Therein the Court stated, "It would seem that disclosure as to oral statements is more fundamental to due process and the right to counsel . . . . The slightest statement uttered during the initial encounter on the street . . . with other proven facts will result in evidence of the most catastrophic dimensions. The most illustrious counsel cannot adequately prepare a defense without knowing what his client has said."

Thus, independent of considerations of challenging the voluntariness of the defendant's statements, considerations of fair play and due process demand that a defendant be apprised before trial of any incriminating statements intended to be offered against the defendant (People v. Briggs, 38 N.Y. 2d, 319, 323).

The cases previously cited all dealt with situations wherein the defense counsel made a pretrial demand for a copy of any statements made by the defendant. In the case herein, defense counsel was provided by the People with a voluntary disclosure from containing notice pursuant to §710.30 of the Criminal Procedure Law. The difference is of no consequence to the issue herein.

The position of the People was that §710.30 does not require that the notice given contain a verbation account of that which was stated by the defendant. In so arguing the prosecutor was certainly correct. However, the statute does require that the People serve notice "specifying the evidence intended to be offered." The word "specify" means "prcise" the use of that word requires a detailed statement of that which was said by the defendant to the

police officer. The notice must be accurate and complete. (People v. Utley, supra, p. 95; People v. Chirico, supra, p. 162). The failure of the People to include within the notice that which is significant renders said notice deficient to that extent as it serves to frustrate the defendant's opportunity to prepare an appropriate defense. (People v. Ludolph, 63 A.D.2d 77, 80-81).

The failure of the People to provide the defenses counsel with notice that the defendant is alleged to have stated to the officer that he had found the gun certainly was a significant omission and one which is neither permissible nor to be construed as harmless error.

The law is now clear that the requirement that the defendant be given pre-trial notice of any statements is not applicable to those of the defendant's statements which the People intend to use merely for impeachment purposes. In Harris v. New York, 401 U.S. 222, the United States Supreme Court held that a defendant who takes the stand may be impeached by a prior inconsistent statement, even though such statement may be inadmissible in the People's case in chief because of a failure to administer the warnings required by Miranda v. Arizona (384 U.S. 436), as long as the statement otherwise satisfied legal standards as to trustworthiness.

The decision in the Harris case does not hold, however, that because such statement may be inadmissible on the People's direct case, that the defendant may not have pretrial disclosure of the contents of such statement. To permit the People to withhold such disclosure because they acknowledge that the statement was obtained in violation of the defendant's rights and then permit its use for the purpose of impeachment without first advising counsel for the defendant of its existence would give to the People an advantage based upon its own misconduct. Such has never been the law of this jurisdiction nor of any other state. (People v. DiMatteo, 80 Misc. 2d 1029, 1031).

It has long been the law of this State that disclosure should not be denied solely to give the prosecution a tactical advantage or to have criminal trials conducted on the basis of "trial by ambush." (People v. DiMatteo, supra, p. 1031; People v. Utley, supra, p. 96).

It should be noted at this time that when the People's witness testified on direct that the defendant herein stated he had "found the gun," the Court first overruled the objection of defense counsel but after a side bar conference sustained the objection and instructed the jury to treat that portion of the statement as if it were never given and that it was not evidence in the case (pp. 198-199 of the transcript).

However, the ruling of the Court does not cure the defect created by the failure of the People to disclose accurately to the defense counsel the contents of the statement made to the police officer. Within the context of the facts herein, the People's omission was of the greatest import. Being unaware of the existence of the alleged statement, the defense had committed itself during its opening statement to the jury to the strategy of having the defendant take the stand and testify in his own behalf. The entire strategy and preparation of the defendant's case was made in reliance upon that information which was contained within the notice served upon the defense by the People pursuant to the requirement of CPL §710.30. Had the existence of the entire statement been made available to the defense as required by law, the defense would have had an adequate opportunity to consider the wisdom of having the defendant testify in his own behalf and thereby subject himself to cross-examination regarding the statement in question upon the issue of credibility.

The rationale for the notice requirement was most aptly stated in *People v. Briggs,* supra, p. 324.

"The issue is not a trivial or merely technical one. Prior statements, especially oral ones, to a police officer, are ac-

corded high credibility by fact finders, jury or Judges. Whether in fact they were made, whether they were voluntary, and the precise form which they took may be crucial to the determination of innocence or guilt. To deprive defendants in criminal matters unnecessarily of an advance opportunity to investigate the facts and circumstances is neither fair nor conducive to establishing the truth through the adversary process with the assistance of counsel. A cavalier treatment of the statute's requirements frustrates its ends."

Of equal applicability to the facts here was the determination that "truth is best revealed by a decent opportunity to prepare in advance of trial. Where the liberty and reputation of a defendant are in jeopardy, every reasonable opportunity and facility should be afforded him in the preparation of his case." (People v. Utley, supra, p. 96)

The failure of the People to comply with the requirements of §710.30 of the Criminal Procedure Law served to deprive the defendant of his right to a fair trial.